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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THEODORE TARVER, JR.,

Plaintiff and Appellant,

v.

CITY AND COUNTY OF
SAN FRANCISCO,

Defendant and Respondent.

A104171

(San Francisco County
Super. Ct. No. 410499)

Theodore Tarver, Jr. appeals from summary judgment granted in favor of defendant City and County of San Francisco (City) in this employment discrimination action. Tarver sued the City for refusing to reinstate him, following his resignation from the San Francisco Police Department (SFPD), because of a physical disability. He contends triable issues of fact exist as to his Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900)¹ claims. We affirm the judgment as to the fifth cause of action and reverse the judgment in all other respects.

STATEMENT OF FACTS

A. Tarver's Employment History with the SFPD and his History of Injuries.

Tarver worked for the SFPD as a police officer from 1984 until he resigned in June of 2001. Tarver injured his back several times while working for the SFPD. He first injured his back in 1988, while apprehending a drunk driver. As Tarver reached in

¹ Unless otherwise noted all further statutory references are to the Government Code.

the vehicle to turn off the ignition, the suspect began to drive away, causing Tarver to be dragged down the street. He eventually returned to full duty after that injury. Then in 1992, Tarver injured a disk in his back, while climbing over a fence in pursuit of a suspect. Following this injury, Tarver never returned to his patrol officer duties. From 1992 until his resignation in 2001, Tarver worked at various desk jobs.

Tarver continued to suffer back pain from 1992 until 1998, when his disk “finally gave out,” while working in the records room.² Following the records room injury, Tarver underwent disk fusion surgery with cage implants and a bone graft. The metal cages are still in place in Tarver’s back, which he describes as providing a foundation to solidify his spine. Tarver eventually went back to work in the records room following the surgery.

In the spring of 2001, Tarver was diagnosed with two new disk bulges, resulting from the increased pressure to his surrounding disks due to the spinal fusion surgery. Shortly thereafter, Tarver requested a hearing before the SFPD duty evaluation committee to request an industrial disability retirement (IDR). In this request, Tarver stated “[m]y physical limitations are now such that I cannot function in my prior light duty capacity.”

However, Tarver cancelled his IDR application, cashed out his pension, and resigned from the SFPD on June 12, 2001. Tarver described his back pain as “pretty severe” in the six months prior to his resignation. He decided to resign because of his back pain and because of financial reasons. At the time of his resignation, Tarver was working in a data entry position, entering information about firearms in state and federal databases.

Several months after he resigned, Tarver’s back pain disappeared. According to Tarver, the disk bulges in his back “reversed” in November 2001. Thereafter, Tarver commenced an extensive exercise regimen to condition his back, which consisted of

² Tarver claims he requested an ergonomic chair to help ease his back pain, but the City refused to spend more than \$600 for such a chair. He states that the City’s failure to comply with his request for an ergonomic chair forced him to leave the SFPD.

riding his recumbent bicycle, kayaking and doing 50 inverted crunches seven days a week. He was more physically fit than he had been in the past 10 years.

B. Tarver's Application for Reinstatement with the SFPD.

On January 30, 2002, Tarver sought reinstatement to a patrol officer position.³ In his letter to the police chief, Tarver stated: "I would like to ask your permission to be reinstated to the San Francisco Police Department. I am requesting my doctor return me to a *full duty status* with the *only limitation of no prolonged stationary standing (i.e. standing at a fixed post without the opportunity to walk around for a full shift)*. If possible I would like to *return to patrol duties. I have the ability to walk a foot beat or radio car patrol*. Taking time off was very beneficial to me in that it gave my *body and mind a chance to heal* from my back surgery. I have for the past four months been *extensively working out and bicycle 10 miles daily on a recumbent bike*." (Italics added.)

According to Tarver, by January 2002, he was able to perform the duties of a patrol officer. In support of his reinstatement request, Tarver submitted a letter and report from his orthopedic surgeon, Dr. Joseph Grant. Although, the work status report included boxes to indicate modified duty and work restrictions, Dr. Grant did not check any of them. Instead, Dr. Grant checked the box for a return to full duty, commencing February 13, 2002. In his accompanying letter, Dr. Grant stated: "I see *no medical reason* why the patient cannot do *a trial of return to full duty* although he has had difficulty in the past with recurrent back pain." (Italics added.)

According to Tarver, the reinstatement process normally takes 10 days to complete, yet his application was stalled. He was told by Captain Sandy Tong, the officer overseeing the reinstatement process that his application was going to the "bottom of the pile." Tarver's background investigation was also delayed. After a month of inaction, Tarver asked Inspector Rockwell if he was being told not to do Tarver's background check. Tarver claims the question was met with silence, demonstrating that

³ Pursuant to Civil Service Commission Rule 214.16.3, "members of the Uniformed Ranks of the Police Department shall have two (2) years from the effective date of resignation to request and be reappointed."

the inspector was told not to do his background check and indicating that his application was dead. Tarver also claims he was told by the officer in charge of the SFPD background checks that he was unable to schedule a psychological examination due to the “issue of my back.”⁴

Tarver’s supervisor, Sergeant George Toy, told him that Captain Tong stated that she did not want Tarver back because she thought he wanted to return to duty for a year so that he could go out on disability. Additionally, Sergeant Toy stated that Lieutenant Tittle, the supervisor in charge of the firearms data entry unit, also told him that he thought Tarver was coming back to work to secure disability retirement benefits.

As part of the reinstatement process, Tarver was required to undergo a physical examination and medical evaluation to determine his fitness for duty. (See Gov. Code, § 1031, subd. (f) [peace officer applicants shall have their physical condition evaluated by a licensed physician and surgeon]; Civil Service Commission Rule 216.1.1, et seq. [requiring all appointees to the SFPD to meet acceptable medical standards]. Tarver attended a physical examination at San Francisco General Hospital (SFGH) in the spring of 2002.

C. Tarver’s Administrative and Civil Complaints against the SFPD.

Tarver filed an administrative complaint with the Department of Fair Employment and Housing (DFEH) on May 17, 2002. The DFEH complaint alleged that Tarver was denied employment, accommodation, and reinstatement because of his race and national origin, physical disability and medical condition. The reasons for the alleged discrimination were as follows: “(a) [retaliation] I filed a race complaint with EEOC [Equal Employment Opportunity Commission], result I have been denied normal return to work, (b) [discrimination] I had a back injury and the department refuses my return to work due to my injury, (c) [accommodations] refused accommodations.”

After receiving a right-to-sue letter from the DFEH, Tarver filed a civil complaint against the City on July 19, 2002. The complaint alleged, among other things, disability

⁴ It is unclear from the record whether this officer was Inspector Rockwell or another SFPD officer.

discrimination, failure to accommodate, failure to prevent discrimination, and failure to engage in a good faith, interactive process.⁵ The City answered the complaint on August 16, 2002.

D. Medical Evaluation by SFPD Physician.

On May 23, 2002, six days after Tarver filed his DFEH complaint, SFPD physician, Wesley Sokolosky, M.D., sent a letter to Tarver. Dr. Sokolosky informed Tarver that he was in the process of evaluating Tarver's medical fitness for reinstatement and requested copies of Tarver's medical records relating to his back problem since he left the SFPD.

After receiving Tarver's medical records, Dr. Sokolosky interviewed Tarver and gave him a physical examination in September 2002. As part of Dr. Sokolosky's evaluation, he reviewed the results of Tarver's exam at San Francisco General Hospital⁶ and his medical records on file with the SFPD, including Dr. Grant's report.

After this entire process, Dr. Sokolosky concluded that Tarver could not in all medical probability perform all of the essential tasks of a patrol officer as required by the San Francisco Police Officer Essential Task List (SFPD Essential Task List) and by the California Commission on Peace Officer Standards and Training (POST).⁷ Specifically, Dr. Sokolosky concluded that Tarver's physical abilities, as measured against the POST medical screening manual and the SFPD Essential Task List, precluded him from performing many essential tasks, including but not limited to the following: (1) with

⁵ The civil complaint also included causes of action for retaliation and violation of the Family Care and Medical Leave Act. Tarver did not oppose summary adjudication of these two causes of action and does not address them on appeal.

⁶ According to Dr. Sokolosky, the San Francisco General Hospital physical exam was not measured on a pass/fail basis.

⁷ "POST is a state-funded organization designed to insure professional standards in law enforcement. Penal Code section 13500 et seq. describes POST's role in setting standards and guidelines pertinent to the selection and training of peace officers." (*Diffey v. Riverside County Sheriff's Department* (2000) 84 Cal.App.4th 1031, 1034 (disapproved on other grounds in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031).) According to the POST guidelines, use of the POST medical screening manual in conducting a medical evaluation is discretionary.

assistance, lift and carry an individual resisting arrest one to 50 feet; (2) stand in one position for extended periods of time, including up to 10 hours; (3) lift and carry supplies and items weighing 10-25 pounds to and from vehicles and supply areas; and (4) without assistance physically restrain or subdue a resistive individual using reasonable force.

In the course of the interview process, Tarver told Dr. Sokolosky he felt he could return to work as a full-time duty patrol officer. However, Dr. Sokolosky never asked Tarver about the specific items he concluded Tarver could not perform. Additionally, Dr. Sokolosky did not give Tarver any tests to determine whether he could perform such tasks. Dr. Sokolosky testified that he did not know of any way to test an individual's ability to lift and carry a person resisting arrest, other than actually performing that specific task. He testified that his medical opinion was not based on anything demonstrated by Tarver. Rather, Dr. Sokolosky determined Tarver was medically disqualified because of his medical history. He also opined that Tarver had a physical disability due to his "bad back." At no time did Dr. Sokolosky talk to Tarver about his requested accommodation to move around if assigned to a stationary position. According to Dr. Sokolosky, the SFPD's policy is not to grant accommodations by modifying items on the SFPD Essential Task List for new hires or reinstated officers. Additionally, Captain Antonio Parra, of the SFPD staff services division, testified that the SFPD maintains a 100 percent healed policy for reinstated officers, with no light duty modifications available.

On September 24, 2002, Captain Tong sent Tarver a certified letter informing him that, based on the SFPD physician's findings, he was medically disqualified from serving as a SFPD police officer.

DISCUSSION

A. Standard of Review.

"Summary judgment is properly granted when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. [Citation.] A defendant seeking summary judgment bears the initial burden of proving the 'cause of action has no merit' by showing that one or more elements of plaintiff's cause of action

cannot be established or there is a complete defense. [Citations.] Once the defendant's burden is met, the burden shifts to the plaintiff to show that a triable issue of fact exists as to that cause of action. [Citations.]

“ ‘This court reviews de novo the trial court's decision to grant summary judgment and we are not bound by the trial court's stated reasons or rationales. . . .’ [Citation.] We accept as true the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them. [Citation.] However, to defeat the motion for summary judgment, the plaintiff must show ‘ “specific facts,” ’ and cannot rely upon the allegations of the pleadings. [Citation.] At the same time, we must bear in mind that, ‘ “[b]ecause discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant.” ’ [Citations.]” (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1385-1386.)

B. Disability Discrimination—First Cause of Action.

The FEHA prohibits an employer from refusing “to hire or employ” an individual based on his or her physical disability. (§ 12940, subd. (a)(1).) However, the FEHA does not prohibit an employer from refusing to hire a physically disabled individual who is unable to or cannot safely perform “essential duties even with reasonable accommodations.” (§ 12940, subd. (a)(1).)

To establish a prima facie case of disability discrimination against the City, Tarver would have to show: (1) he suffers from a disability; (2) he is otherwise qualified to perform the duties of the position (with or without accommodation); and (3) he was subjected to an adverse employment action because of his disability or perceived disability. (See, e.g., *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 255; *Deschene v. Pinole Point Steel Co.* (1999) 76 Cal.App.4th 33, 44.)

If Tarver satisfies his initial burden, the City must then offer a legitimate nondiscriminatory reason for the adverse employment decision. (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735.) Finally, Tarver bears the burden of proving the City's proffered reason was pretextual. (*Ibid.*)

1. Physical Disability.

The FEHA defines a physical disability as “any physiological disease, disorder, [or] condition . . .” that affects certain body systems, including the musculoskeletal system, and “[l]imits a major life activity [,]” including working. (§ 12926, subd. (k)(1)(A).) A physical disability “limits a major life activity if it makes the achievement of the major life activity difficult.” (§ 12929, subd. (k)(1)(B)(ii).)

An individual is also deemed to have a “physical disability” if he or she: (1) has a history of a qualifying physical condition, which is known by the employer; (2) is regarded or treated by an employer as having a qualifying condition; or (3) is regarded or treated by an employer as having a qualifying condition that has no present disabling effect but may become a physical disability. (§ 12926, subd. (k).)

In its motion for summary judgment, the City took the position that Tarver was not physically disabled because he denied being disabled and claimed that he could return to full duty as a patrol officer.⁸ However, Dr. Sokolosky, the SFPD’s own physician, opined that Tarver was physically disabled due to his “bad back.” Moreover, Tarver has a history of back injuries that is known to the SFPD, this combined with Dr. Sokolosky’s testimony that he based his opinion on Tarver’s medical history is sufficient to create a triable issue of fact that the SFPD regarded Tarver as being physically disabled. Tarver’s statement that he could return to work on full duty patrol does not diminish such triable issues of fact. Rather, this statement only serves to create a triable issue of fact as to whether he was disabled when he sought reinstatement.

2. Essential Job Functions.

The FEHA defines the essential functions of a position as being “the fundamental job duties of the employment position the individual with a disability holds or desires” not including the “*marginal functions* of the position.” (§ 12926, subd. (f); italics added.) Evidence that may be considered in determining the essential functions of a job

⁸ On appeal, the City does not address the physical disability element. Rather, the City argues that Tarver cannot perform the essential functions of a police officer with or without reasonable accommodations.

“includes, but is not limited to, the following: [¶] (A) The employer’s judgment as to which functions are essential. [¶] (B) Written job descriptions prepared before advertising or interviewing applicants for the job. [¶] (C) The amount of time spent on the job performing the function. [¶] (D) The consequences of not requiring the incumbent to perform the function. [¶] (E) The terms of a collective bargaining agreement. [¶] (F) The work experiences of past incumbents in the job. [¶] (G) The current work experience of incumbents in similar jobs.” (§ 12926, subd. (f)(2).)

The City contends that summary judgment was properly granted because Tarver cannot perform the essential functions of a police officer with or without accommodation. We in turn address the issues of what constitutes an essential function and whether Tarver is able to perform such functions.

According to the City, the essential functions of a SFPD police officer are set forth in the SFPD Essential Task List. The SFPD Essential Task list contains 234 functions of a police officer, including being able to walk or stand for long periods of time, to run, climb and bend, and to engage in physical altercations. The duties relevant to the instant case include being able to: (1) “Stand for extended periods (e.g., up to 10 hours) during stakeout, surveillance, accident/crime scene, crowd control, demonstrations”; (2) “*Without* assistance, lift and carry cooperative person (e.g., disabled person, unconscious person) 1-50 feet”; (3) *With* assistance, lift and carry individual resisting arrest (e.g., protester, suspect) 1-50 feet”; (4) *Without* assistance, physically restrain (e.g., handcuff, hold) or subdue a resistive individual (e.g., suspect, mental patient, drugged person) using reasonable force in order to transport them to the police department or keep them under control while further investigations take place.”⁹

Tarver contends that the SFPD Essential Task List provides a list of every possible task an officer might be required to perform and does not distinguish between essential

⁹ The City also cites two additional tasks: (1) with assistance, lift individual resisting arrest into back of paddy wagon and carry to front of paddy wagon, and (2) control crowd by using body and/or baton to restrain or hold back crowd members crossing barricaded boundaries. However, these two tasks were not included in the reasons for Tarver’s medical disqualification.

and marginal tasks. Dr. Sokolosky even admitted that he knew of no document that differentiates between essential and marginal tasks. In support of his position, Tarver submitted declarations of two current employees, Sergeant Toy and Officer E.R. Balinton attesting that the SFPD Essential Task List is not representative of the essential functions performed by patrol officers.¹⁰ The City attacks the credibility of Sergeant Toy and Officer Balinton, citing the past misconduct of Officer Balinton and the past injuries of Sergeant Toy as placing them in “light duty” positions, which do not involve the functions of a patrol officer. However, the credibility of a witness’s testimony is a question for the trier of fact. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 830, 840.) The task before a reviewing court on summary judgment, like the one before the trial court, is not to weigh the evidence, or evaluate the credibility or the plausibility of a plaintiff’s claims. (*Ibid.*) Accordingly, we are not persuaded by the City’s challenges to this evidence.

We now turn to the specific tasks that Tarver was deemed to be unable to perform. With respect to the standing task, Dr. Sokolosky concluded that Tarver would be unable to stand in one position for extended periods of time, including up to 10 hours. The ability to stand for up to 10 hours is not listed in the written job description, written job listing, SFPD General Order No. 1.03, describing the duties of a patrol officer, or in the POST list of patrol officer job demands. This evidence creates a triable issue of fact as to whether the standing requirement listed in the SFPD Essential Task List is an essential function or a marginal one.

The ability to lift and carry supplies and items weighing from 10-25 pounds to and from vehicles is not listed in the written job description, written job listing, or SFPD General Order No. 1.03. To the extent lifting and carrying is listed in the written job description, the weight and distance requirements are not specified. Included in the “job related and essential qualifications” listed in the written job description is the ability to

¹⁰ We agree with the City that the opinions of Tarver’s retained expert and subsequent employers regarding what constitutes an essential function are irrelevant. However, the opinions of past and current incumbents in the job are relevant in determining what constitutes an essential function. (See § 12926, subd. (f)(2)(F) & (G).)

“use muscle force for a task lasting less than one minute which involves lifting/carrying, pushing or holding.” Similarly, the ability to lift and carry a cooperative person 1-50 feet without assistance, the ability to lift and carry a person resisting arrest 1-50 feet with assistance, and the ability to restrain a resistive individual using reasonable force without assistance are not listed in the written job description, written job listing, or SFPD General Order No.1.03. To the extent the POST list of patrol officer job demands includes tasks similar to the SFPD Essential Task List, pertaining to the lifting/carrying and restraint tasks, this only serves to create a triable issue of fact.

Based on the conflicting evidence in the record, we find there is a triable issue of fact as to whether the SFPD Essential Task List is representative of the essential functions of a patrol officer.

The City contends that Tarver’s argument that the SFPD Essential Task List does not reflect the essential functions of a patrol officer is without merit. Citing to *Quinn v. City of Los Angeles* (2000) 84 Cal.App.4th 472, 482-483, the City argues that an employer, specifically a police department, has the right to define and apply its own hiring criteria. There, a police department mistakenly hired a severely hearing impaired individual as a police officer, after he failed a sound localization test. (*Id.* at pp. 477, 482.) After failing the test, plaintiff received a letter informing him that he would be removed from the list of candidates. (*Id.* at p. 477.) However, soon thereafter, plaintiff received another letter advising him to appear at the police academy for a physical abilities test. It was uncontested that the second letter was sent in error. The error originated in the city clerk’s office, which mistakenly imputed in the computer records system that plaintiff had passed the medical exam. Recognizing the mistake, plaintiff called to ascertain his status. Based on the incorrect information in the computer, plaintiff was told that he had passed the medical exam. Thereafter, plaintiff passed the physical abilities and psychological tests, cleared the background check, and was admitted into the police academy. Plaintiff’s hearing impairment eventually manifested itself in terms of the ability to hear the radio and his partner’s instructions. He was given a portable radio with shoulder microphone, which somewhat alleviated the problem.

Eventually, he was removed from the field and assigned to a desk job. (*Ibid.*) When the clerical error was later discovered, plaintiff was discharged. (*Id.* at p. 482.) The court held there was no disability discrimination because plaintiff was never qualified for the position from which he was discharged. (*Id.* at p. 483.) In so holding, the court found that a co-worker's favorable testimony about plaintiff's performance, and his opinion that plaintiff's hearing impairment did not negatively affect that performance, was irrelevant as a matter of law to the question of whether plaintiff was qualified to be hired as a police officer in the first place. The *Quinn* court found that this was a matter solely to be determined by the police department. (*Ibid.*) The court further noted that it was within the discretion of the police department to set physical criteria for the hiring process. (*Id.* at p. 482.)

We acknowledge that *Quinn* goes a long way to further the City's position, but find it does not go far enough to warrant summary judgment in this case. First, while *Quinn* provides that an employer has discretion to set physical criteria in the hiring process, it does not go so far as to say that a plaintiff is summarily precluded from challenging an employer's determination of what tasks constitute essential functions of a particular job. Moreover, under the FEHA an employer's judgment regarding an essential function is only one of many factors to be considered. "Evidence of whether a particular function is essential includes, but is not limited to, the following: [¶] (A) The employer's judgment as to which functions are essential. [¶] (B) Written job descriptions prepared before advertising or interviewing applicants for the job. [¶] (C) The amount of time spent on performing the function. [¶] (D) The consequences of not requiring the incumbent to perform the function. [¶] (E) The terms of a collective bargaining agreement. [¶] (F) The work experiences of past incumbents in the job. [¶] (G) The current work experience of incumbents in similar jobs." (§ 12926, subd. (f)(2).)

Second, *Quinn* is factually dissimilar from the instant case. There, it was undisputed that the plaintiff failed a hearing test and that hearing was a reasonable physical requirement for the job. It was under these circumstances that the court found that testimony from plaintiff's co-worker to be irrelevant. Here, however, Tarver was

never given any tests to determine whether he could perform the tasks in issue. Additionally, there is a dispute regarding whether the ability to stand without movement for up to 10 hours is a reasonable physical requirement. As such, the declarations of Sergeant Toy and Officer Balinton, as former incumbents, are relevant in determining whether standing for prolonged periods of time is an essential task as opposed to a merely marginal one. (See § 12926, subd. (f)(2)(F).)

Even were we to assume that the SFPD Essential Task List properly enumerates essential job functions, the City has failed to establish that Tarver could not perform them with reasonable accommodations. Based on our review of the record, the only accommodation sought by Tarver, at the time of reinstatement, was the ability to stretch if he was required to stand for prolonged periods of time.¹¹ Well after his medical disqualification and the filing of his administrative and civil complaints, Tarver testified in a deposition that he would be “leery” of being assigned to the riot squad, due to the prolonged, fixed standing and wearing heavy gear. Tarver quickly added that a reasonable accommodation could be added if he were assigned to this unit, such as working in prisoner bookings or transports.

The City relies on Tarver’s testimony as providing undisputed evidence that he cannot perform the essential tasks without accommodation. However, the relevant inquiry is whether Tarver can perform the essential tasks *with or without accommodation*. (See § 12940, subd. (a)(1); *Jensen v. Wells Fargo Bank, supra*, 85 Cal.App.4th at p. 255; *Deschene v. Pinole Point Steel Co., supra*, 76 Cal.App.4th at p. 44.)

The City summarily dismisses the accommodations sought by Tarver as not being reasonable as a matter of law. The City’s position is that standing for prolonged periods of time is an essential function of a police officer, that it has no obligation to eliminate this essential function, and that by his request to be allowed to walk around to stretch his back, Tarver is requesting that he be exempted from an essential function of the position sought. The evidence before us simply does not establish the facts necessary to support

¹¹ Contrary to the City’s assertion, we find no basis for interpreting this requested accommodation as a request to give Tarver his data entry position back.

this argument. As discussed, there is a triable issue of fact regarding whether standing for prolonged periods of time is an essential job function. Even if this were an essential job function, the SFPD Essential Task List does not state that an individual is required to stand, fixed with no movement, for up to 10 hours. To the extent that Dr. Sokolosky testified that he understood the standing requirement as being able to stand at a post for up to 10 hours without the opportunity to walk around, we find this testimony creates yet another triable issue of fact.

The City also ignores evidence submitted by Tarver that he is able to perform the essential functions of a patrol officer. Tarver's treating physician, Dr. Grant, found Tarver could return to full duty, without any limitation. The City discounts Dr. Grant's recommendation because he only recommended "a trial of return to full duty." The City presented a declaration from Captain Parra that the SFPD does not hire patrol officers into "trial run" positions, because such conditional positions could endanger the safety of the public or the officer. Other than this declaration, the City presents no evidence regarding its public safety defense. Based on this limited evidence, we find the City has not met its burden of proving by a preponderance of the evidence that Tarver poses a threat to the health and safety of others. (See *Raytheon Co. v. Fair Employment & Housing Com.* (1989) 212 Cal.App.3d 1242, 1252.)

In addition to Dr. Grant's report, Tarver submitted numerous declarations from subsequent employers stating that he is able to meet or exceed the SFPD requirements. Specifically, Tarver presented evidence that during the period of time in which he was medically disqualified, he lifted jump houses (inflatable structures used at children's birthday parties), weighing 150 to 200 pounds by himself. Tarver also presented evidence that in his current position, as a Solano County park ranger, he lifts trash bags weighing 60 pounds and carries them across the beaches and over rough terrain up to a mile to throw them away. Tarver's current supervisors state that Tarver often stands for an entire shift, routinely does traffic control, and collects funds at the park entrance for up to 10 hours a day. Tarver states he is able to perform such tasks as long as he can stretch.

Additionally, Tarver's supervisors have observed Tarver making felony arrests, where the suspect violently resisted.

We find the evidence of Tarver's subsequent employers to be relevant. We find no conflict with *Quinn v. City of Los Angeles*, *supra*, 84 Cal.App.4th 872 in this regard. Here, unlike *Quinn*, there is a factual dispute as to whether Tarver can perform the tasks that the SFPD determined he was unable to do. In *Quinn*, it was undisputed that the officer failed a hearing test. (*Id.* at p. 876.) Whereas in the instant case, Tarver was never given any tests to demonstrate whether he could perform the tasks in issue. The evidence from the subsequent employers, while irrelevant to determining what constitutes an essential function, nonetheless is relevant as to the extent of Tarver's ability to perform the tasks in issue.

Accordingly, we find triable issues of fact exist regarding whether Tarver could perform the essential functions of a patrol officer with reasonable accommodations.

3. Evidence of Pretext.

The City next contends that summary judgment was properly granted because even if Tarver could have established a *prima facie* case of disability discrimination, he failed to show that the City's reason for rejecting him from the SFPD was based on pretext.

“ ‘[T]he plaintiff may establish pretext “either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” ’ [Citations.] Circumstantial evidence of “pretense” must be “specific” and “substantial” in order to create a triable issue with respect to whether the employer intended to discriminate’ on an improper basis. [Citation.] With direct evidence of pretext, “a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial.” [Citation.] The plaintiff is required to produce “very little” direct evidence of the employer’s discriminatory intent to move past summary judgment.’ ” (Fn. omitted.) (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68-69.)

Here, Tarver presented direct evidence that Captain Tong and Lieutenant Tittle had stated that they did not want him back because he was injured and that they thought he sought return to duty only to obtain disability benefits. The City dismisses this evidence as mere hearsay.¹²

The hearsay rule and its exceptions apply to the contents of declarations on a motion for summary judgment. (See *L&B Real Estate v. Superior Court* (1998) 67 Cal.App.4th 1342, 1348.) The relevant hearsay exception in the instant case is found in Evidence Code section 1222, which provides: “Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: [¶] (a) *The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement*; and [¶] (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court’s discretion as to the order of proof, subject to the admission of such evidence.” (Italics added.)

“The authority of a declarant employee to make a statement ‘for’ an employer ‘concerning the subject matter of the statement’ can be implied, as well as express. [Citation.] For this reason the question of an employee’s authorization to make a given statement can present a tricky problem for a trial court, because the determination *necessarily depends on the particular facts and circumstances of each case* viewed in the light of the substantive law of *agency*, as distinct from evidence.” (*O’Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 570; first italics added; second italics original.)

In *O’Mary v. Mitsubishi Electronics America, Inc.*, *supra*, 59 Cal.App.4th 563, plaintiff sued his employer for age discrimination. At trial, the court excluded, on hearsay grounds, deposition testimony of a company manager concerning a managers’

¹² In support of its motion for summary judgment, the City objected to the statements of Captain Tong and Lieutenant Tittle on hearsay grounds. During argument, the City attempted to secure a ruling on this issue and on its other evidentiary objections, to which the trial court replied: “As the Court sitting in this position always says, “We considered the relevant evidence.”

meeting he attended, at which a senior managing director of the company had made a statement “about ‘getting rid of managers who were over 40 and replacing them with younger, more aggressive managers,’ ” and that the president of the company concurred. (*Id.* at pp. 568-569.) After finding a hearsay exception existed for each layer, the appellate court found the trial court improperly excluded the triple hearsay statement. (*Id.* at pp. 572-574.) The *O’Mary* court found there was really no question that the senior managing director and the president of the company had authority to make an authorized statement. (*Id.* at pp. 572-573.) As to the vice-president’s statement, the court found that it was undisputed that he, like the other declarants, occupied a “particularly high place in the employer’s hierarchy.” (*Id.* at p. 572.)

Another case discussing the hearsay rule and its exceptions at the summary judgment stage is *Morgan v. Regents of University of California*, *supra*, 88 Cal.App.4th 52. There, the plaintiff alleged that his employer did not rehire him after a layoff in retaliation for having previously filed a racial discrimination grievance. (*Id.* at p. 56.) In support of his retaliation claim, plaintiff relied on statements from three employees that he would not be rehired because of his grievance filed against the employer. (*Id.* at p. 70.) The appellate court found that statements from the employees could not qualify as authorized admissions because there was no evidence indicating that the individuals were involved in the decision not to rehire plaintiff. (*Ibid.*)

Here, Tarver presented a declaration from Sergeant Toy stating that Captain Tong and Lieutenant Tittle told him that they did not want Tarver reinstated because they were suspicious of his motives. As previously indicated, whether the statements qualify as authorized admissions is to be determined under the law of the agency, which necessarily depends on the facts and circumstances of the case. (*O’Mary v. Mitsubishi Electronics America, Inc.*, *supra*, 59 Cal.App.4th at p. 570.)

The facts and circumstances of the instant case are that Sergeant Toy, Tarver’s sergeant, went to Captain Tong, the officer in charge of Tarver’s reinstatement process, to determine the cause of the delay in his application. According to Sergeant Toy, Captain Tong told him that she did not want Tarver back because she thought he wanted to come

back in order to work for a year to qualify for disability retirement. As the officer in charge of Tarver's reinstatement application, Captain Tong was clearly involved in the SFPD's decision not to rehire Tarver. In fact, it was Captain Tong who sent Tarver the letter informing him that he was medically disqualified from serving as a police officer.

Sergeant Toy also went to Lieutenant Tittle and asked about the delay in Tarver's reinstatement, which was met with a response similar to that of Captain Tong. As Lieutenant Tittle was the supervisor in charge of the unit where Tarver had worked prior to his resignation, there is at least a triable issue of fact regarding his involvement in the decision not to rehire Tarver.

Given their respective places in the SFPD hierarchy, we find triable issues of fact exist regarding whether the statements by Captain Tong, and Lieutenant Tittle constitute authorized admissions.¹³ Accordingly, we find there is a triable issue of fact regarding whether the City's decision was based on pretext.

C. Failure to Accommodate—Second Cause of Action.

Under the FEHA it is an unlawful employment practice for an employer "to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee." (§ 12940, subd. (m).) However, the FEHA does not require an employer to make an accommodation that would produce a demonstrated undue hardship to its operations. (*Ibid.*) " 'Reasonable accommodation may, but does not necessarily, include, nor is it limited to, such measures as: [¶] (1) Accessibility. Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; [¶] (2) Job Restructuring. Job restructuring, reassignment to a vacant position, part-time or modified work schedules, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar actions.' " (*Prilliman*

¹³ Tarver's statement that Captain Tong told him that his application was going to the bottom of the pile would similarly fall into this category. However, the statements regarding the delay in Tarver's background check and psychological evaluation would not, as there is insufficient evidence in the record regarding the identity of the declarants.

v. United Air Lines (1997) 53 Cal.App.4th 935, 947; see also Cal. Code Regs., tit. 2, § 7293.9 (a).)

The City argues that summary judgment was properly granted as to Tarver's failure to accommodate cause of action for two reasons. First, Tarver was only a job applicant, and as such, was limited to accommodation in the application process. In support of this argument, the City relies on dicta in one case, which quotes an EEOC interpretative guideline explaining that "[t]here are three categories of reasonable accommodation. There are (1) accommodations that are required to ensure equal opportunity in the application process; (2) accommodations that enable the employer's employees with disabilities to perform the essential functions of a position held or desired; and (3) accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities." (*Brundage v. Hahn* (1997) 57 Cal.App.4th 228, 239.) In *Brundage*, an employee was discharged for being absent from her job without contacting her employer, the County of Los Angeles, for six weeks. As a civil service employee, plaintiff sought reinstatement, which was denied. Plaintiff then sued the county for terminating and refusing to reinstate her because of a mental disability. (*Id.* at pp. 231-233.) She claimed that reinstatement constituted a reasonable accommodation of her mental disability. The court was not persuaded by this argument, finding that plaintiff did not seek " 'accommodations that [would] enable [her] to perform the essential functions of the position held or desired. . . . ' " (*Id.* at p. 240.) Rather, the court found that Brundage simply wanted her position back, which did not qualify as a reasonable accommodation. (*Ibid.*)

Contrary to the City's contention, *Brundage* does not stand for the proposition that an applicant's accommodations are limited to the application process. There, like here, the plaintiff was a former employee seeking reinstatement. The *Brundage* court did not affirm summary judgment in the county's favor because the plaintiff was limited to reasonable accommodations in the application process, but found that her requested

accommodation to get her job back was not a reasonable accommodation.¹⁴ (*Brundage v. Hahn, supra*, 57 Cal.App.4th at pp. 231, 240.)

Accordingly, we find no support for the City's argument that summary judgment was proper because it was only required to provide reasonable accommodation to Tarver in the application process.

The City next contends that it was not required to place Tarver in a desk job. It is undisputed that prior to his resignation, Tarver worked in the records room performing data entry on gun transfers. However, Tarver's reinstatement request was to return to full patrol duties, with the only accommodation being able to stretch if he were assigned to a task involving prolonged standing. The issue before us is whether Tarver's requested accommodation was reasonable. " 'The law and its regulations make clear that the term "reasonable accommodation" is to be interpreted flexibly.' " (*Prilliman v. United Air Lines, Inc., supra*, 53 Cal.App.4th at p. 948.) While there are limits on the accommodations that an employer must provide, the City has presented no evidence that Tarver's requested accommodation is unreasonable or would create an undue hardship. Accordingly, we find the City has failed to meet its burden of proving that Tarver's failure to accommodate a cause of action has no merit or that it has a complete defense to this cause of action.

D. Remaining Causes of Action.

Finally, we turn to the causes of action that the City claims are barred by reason of Tarver's failure to include them in his DFEH charge.

"In order to bring a civil action under [the] FEHA, the aggrieved person must exhaust the administrative remedies provided by law." (*Yurick v. Superior Court* (1989)

¹⁴ Citing to *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, Tarver argues that the trial court erred in applying *Brundage* in determining whether the City failed to provide him with reasonable accommodations. *Bagatti* criticized *Brundage* for relying on the EEOC interpretative guidelines. (*Bagatti, supra*, at p. 358.) After distinguishing reasonable accommodations under the FEHA from those under the Americans with Disabilities Act (ADA), the *Bagatti* court concluded that the duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA. (*Id.* at p. 362.)

209 Cal.App.3d 1116, 1121.) Exhaustion requires filing a written charge with the DFEH within one year of the alleged unlawful employment discrimination, and obtaining notice from the DFEH of the right to sue. (*Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1613.) The scope of the written charge defines the permissible scope of the subsequent civil action. (*Yurick, supra*, at pp. 1121-1123.) Allegations in the civil complaint falling outside of the scope of the administrative charge are barred for failure to exhaust. (*Rodriguez v. Airborne Express* (9th Cir. 2001) 265 F.3d 890, 897 [applying California law].) However, the procedural requirements, as with all provisions of the FEHA, are to “be construed liberally for the accomplishment of the purposes [of the FEHA].” (§ 12993, subd. (a).)

Both California courts and courts from other jurisdictions have endorsed the “like or reasonably related standard,” which provides that the allegations in a civil suit are within the scope of an administrative investigation which can reasonably be expected to grow out of the charge of discrimination. (*Sandhu v. Lockheed Missiles & Space Co.* (1994) 26 Cal.App.4th 846, 858-859 [adopting standard of Fifth and Ninth Circuits and finding that an allegation of racial discrimination would encompass a claim for national origin discrimination].)

1. Failure to Prevent Discrimination—Third Cause of Action.

The FEHA makes it an unlawful employment practice for an employer “to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.” (§ 12940, subd. (k).) Courts have interpreted this provision as creating a tort sounding in negligence with the usual elements of breach of duty, causation and damages. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 286-287.) The cause of action does not stand alone, but depends upon one being able to prove he or she was actually the victim of discrimination. (*Ibid.*) Inasmuch as this cause of action is dependent on the existence of discrimination, we find that it is “like or reasonably related” to a discrimination claim. (*Sandhu v. Lockheed Missiles & Space Co., supra*, 26 Cal.App.4th at pp. 858-859.) Accordingly, failure to exhaust administrative remedies was not a proper basis for summary judgment.

Turning to the merits, Tarver would have to demonstrate that he was discriminated against because of the negligence of the City in allowing discrimination to occur in order to prevail on this cause of action. Tarver contends that he was intentionally discriminated against because of the perception that he is disabled. The City denies that, but also insists that its policy of denying accommodation to an applicant beyond the application stage does not violate FEHA. Assuming that Tarver can establish that he has been the victim of discrimination, a jury could find that it was the result of the enforcement of a policy that “permits” discrimination to occur.

Summary judgment as to this cause of action was improper.

2. Failure to Engage in a Good Faith Interactive Process—Fifth Cause of Action.

The FEHA makes it an unlawful employment practice for an employer “to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.” (§ 12940, subd. (n).)

The trial court granted summary judgment on the basis that failure to engage in the good faith interactive process is not a viable cause of action separate from a failure to accommodate claim. (See *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 262-263.) Inasmuch as Tarver fails to address the propriety of the trial court’s ruling as to this cause of action, we deem any claim of error as abandoned for lack of argument.¹⁵ (See *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2; *McGettigan v. Bay Area Rapid Transit Dist.* (1997) 57 Cal.App.4th 1011, 1016, fn. 4.)

DISPOSITION

The judgment is affirmed as to the fifth cause of action, and is reversed in all other respects. The matter is remanded for proceedings not inconsistent with this opinion.

¹⁵ By reason of this waiver, we need not address the City’s argument that Tarver failed to exhaust his administrative remedies as to this cause of action.

Kay, P.J.

We concur:

Reardon, J.

Sepulveda, J.